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(CLOUT)

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INTRODUCTION

This compilation of abstracts forms part of the system for collecting and disseminating information on court decisions and arbitral awards relating to Conventions and Model Laws that emanate from the work of the United Nations Commission on International Trade Law (UNCITRAL). Information about the features of that system and about its use is provided in the User Guide (A/CN.9/SER.C/GUIDE/1). CLOUT documents are available on the website of the UNCITRAL secretariat on the Internet (http://www.un.or.at/uncitral).

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I. CASES RELATING TO THE UNITED NATIONS SALES CONVENTION (CISG)

Case 235: CISG 38; 39(1); 45(1)(b); 49(1)(a); 51(1); 74; 81(1); 82(1); 82(2)(b)
Germany: Bundesgerichtshof; VIII ZR 300/96
25 June 1997
Original in German
Published in German [1997] Neue Juristische Wochenschrift 3311; [1997] Der Betrieb 2073; [1998] Lindenmaier-Möhring 2 (No. 4); [1997] Wertpapiermitteilungen 2313; [1997] Monatsschrift für Deutsches Recht 1105; [1997] Recht der internationalen Wirtschaft 1037; and [1998] Europäische Zeitschrift für Wirtschaftsrecht 29
Abstract published in German in [1997] Eildienst Bundesgerichtliche Entscheidungen (BGH-Ls) 529; [1997] Entscheidungen zum Wirtschaftsrecht 3311; [1998] Schweizerische Zeitschrift für Internationales und Europäisches Recht 85 and [1997] Wirtschaftsrechtliche Beratung 1315
Commented on in German by Magnus in [1998] Lindenmaier-Möhring 2 (No. 4); Schlechtriem/Schmidt-Kessel in [1997] Entscheidungen zum Wirtschaftsrecht 3311; Gaus in [1997] Wirtschaftsrechtliche Beratung 1315; and in French by Witz [1998] Receuil Dalloz, 34ème Cahier, Sommaire commentés, 309

A German seller, plaintiff, delivered stainless steel wire to a Swiss buyer, defendant. The buyer gave notice to the seller that it was unable to work with the sub-standard goods delivered and placed them at the seller's disposal. The seller declared its intention to credit the value of the goods if the buyer's contention of lack of conformity was justified.

The seller sued the buyer for the unpaid purchase price. The buyer claimed set-off for expenses incurred with the refacing of a grinding machine, which was utilized for processing the defective goods.

The Court dismissed the seller's claim. The buyer was entitled to declare the contract avoided under articles 81(1), 49(1)(a) and 51(1) CISG. In fact, the buyer had effectively avoided the contract by communicating to the seller that it could not use sub-standard goods. The court left open whether the buyer examined the goods (article 38 CISG) and gave notice (article 39 CISG) within a reasonable period of time since the seller had waived its right to object by agreeing to credit the value of the non-conforming goods.

The impossibility of restoring the goods to their original condition did not disqualify the buyer from avoiding the contract under article 82(1) CISG. Both parties were aware that the goods had to be processed before any non-conformity could be discovered. Moreover, the buyer was entitled to declare the contract avoided if upon examination it was discovered that the goods had perished or deteriorated (article 82(2)(b) CISG).

The court also dismissed the set-off since the expenses for the refacing of the grinding machine were not reasonable in relation to the amount of the claim for the purchase price and had to be borne by the buyer under article 74 CISG. The court stated that considering the amount of

the expenses in question, the buyer should have returned the goods and claimed damages under articles 45(1)(b) and 74 CISG.

Case 236: CISG 1(1)(b); 4(2)(a); 45(1)(b); 53; 54
Germany: Bundesgerichtshof; VIII ZR 134/96
23 July 1997
Original in German
Published in German in [1997] Neue Juristische Wochenschrift 3309
Abstract published in German in [1997] Schweizerische Zeitschrift für Internationales und Europäisches Recht 86 and [1997] Entscheidungen zum Wirtschaftsrecht 958
Commented on in German by Schlechtriem/Schmidt-Kessel [1997] Entscheidungen zum Wirtschaftsrecht 958

An Italian seller, plaintiff, claimed payment for clothes delivered to a German buyer, defendant, under a supply contract.

The buyer refused payment of the purchase price for the goods, alleging that the parties had a void franchise agreement since it violated European and German antitrust laws. The buyer also adduced that the nullity of the franchise agreement affected the validity of their supply contract.

The court held that the CISG was applicable under its article 1(1)(b) since the parties had agreed to the application of German law. The seller's claim was justified under articles 53 and 54 CISG. It was insignificant whether the franchise agreement violated German or European antitrust laws inasmuch as the nullity of the franchise agreement did not affect the validity of the supply contract. However, each supply contract had to be examined separately and the validity of the supply contract was not governed by the CISG in keeping with its article 4(2)(a). The court also held that the buyer was obliged to pay the seller the purchase price and that the buyer was not entitled to claim damages under article 45(1)(b) CISG.

Case 237: CISG 7(2); 35(2); 38; 39; 40
Arbitration Institute of the Stockholm Chamber of Commerce
(Arbitral award issued on the basis of liability; separate award to be issued on amount of damages)
5 June 1998
Unpublished (English)

(Abstract prepared by Peter Winship)

A manufacturer in the United States contracted with a joint venture in the People's Republic of China to sell a press. The contract guaranteed that the press was made of "the best materials with first class workmanship, brand new and unused." During manufacture, the seller substituted a different lockplate for the lockplate described in the design documents given to the buyer. The seller did not inform the buyer of this substitution or of the need to install the lockplate properly. The seller shipped the disassembled press from the United States to China and when the buyer reassembled the press in China the lockplate was installed improperly. Slightly more than four years after the seller shipped the press, the lockplate broke, causing significant damage to the press. The buyer immediately notified the seller. When the seller rejected any liability for the breakdown, the buyer requested arbitration.

The issues before the arbitral tribunal were whether the U.S. seller made a non-conforming tender of goods and whether the Chinese buyer's claim of non-conforming goods was timely.

The arbitral tribunal found the seller liable for damages for the failure of the press. The tribunal concluded that the tender of the press did not conform under article 35(2) CISG. The seller was aware of the possibility that the substitute lockplate would probably fail if it was not properly installed. The seller, nonetheless, failed to inform the buyer of the need to install the lockplate properly. The mere inclusion of an express guarantee in the contract did not exclude the obligations set out in article 35(2) CISG. The tribunal further found that the buyer was not negligent when it installed the lockplate or later maintained the press.

A majority of the tribunal also found that the buyer's claim was timely because under article 40 CISG the seller was not entitled to rely on the time limits set forth in article 39 CISG. The tribunal stated that it did not matter whether the non-conformity resulted from breach of the contract guarantee or breach of article 35 CISG. Even if articles 38 and 39 CISG were concerned only with examination and notice of non-conformity under CISG, article 40 CISG states a general principle that applies to contractual obligations by virtue of article 7(2) CISG. The majority of the tribunal concluded that article 40 CISG excused notice by the buyer because the seller "consciously disregarded facts which were of evident relevance to the nonconformity".

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